REPRIEVE

July 9, 2010

Rt. Hon. David Cameron
10 Downing Street
London

Re: Secrecy and the Torture Inquiry

Dear Prime Minister,

Your announcement this week of the torture inquiry was, of course, welcome. I am writing to follow up, as there are obviously various issues that need to be clarified.

One is the degree to which the inquiry can be held in secret, behind closed doors.

As early as 2006, Mr Hague identified the "critical erosion of our moral authority" arising from reports of prisoner abuse by British and American troops. As you noted in 2009, "the key thing is getting to the bottom of what happened and making sure that if mistakes have been made in the past, ministers are open and clear about that and remove this potential stain from Britain's name."

Obviously, ministers and other officials cannot be "open and clear" if hearings are held in secret. A public exorcism of the stains of the past is crucial if we are to rebuild our national reputation.

I am sure you would agree that we cannot learn from history, and avoid repeating our mistakes, if we do not know what that history is. Ministers cannot shape new rules that they feel will overcome the flaws of the past, based on evidence that is largely withheld from the public. It has been the ministers (albeit from the Labour Party) who fought tooth and nail to prevent any meaningful criticism of the actions of the Security Services to date.

Neither is not sufficient for Sir Peter Gibson and his two colleagues to know what the history is, and distil what they deem significant into a report that may, in turn, be redacted by the Cabinet Office. As Lord Neuberger (Master of the Rolls), Lord Justice Maurice Kay and Lord Justice Sullivan said in the *Al-Rawi* case, the notion of public justice is one of our nation's "most fundamental principles". British officialdom is on trial in this inquiry, and "trials should be conducted in public, and the judgments should be given in public".

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Obviously I accept that limited materials must be kept secret. Clearly, it is in nobody's legitimate interest that we disclose the names of agents, for example. However, some of your statements this week might be misconstrued as suggesting that the majority of evidence relating to the intelligence services should be held in secret.

Such a procedure would be unnecessary and would undermine the very purpose of the inquiry. The problem to date has been that the actions have largely been taken under the veil of secrecy. You have said that the inquiry cannot proceed until the civil cases are resolved: while I only represented the former Guantánamo prisoners in U.S. courts, and they are ably represented by other counsel here in Britain, I suspect that they are more concerned with a full, fair and open inquiry than they are with the quantum of compensation. The most important issue is that nobody in future should have to suffer as they did. A precondition for settlement of the civil cases will no doubt include firm assurances that the inquiry will apply a strong presumption in favour of openness and that the key materials will all be made public at, or immediately after, the time they are considered.

There is an enormous, and justified, interest in this inquiry. There are various ways in which this public interest may be respected.

First, there should be a clear definition of "national security" that Sir Peter and his colleagues can apply when deciding whether particular materials should be kept secret. The definition should be along the following lines, consistent with the *Official Secrets Act of 1989*:

> Secret material is defined as material which, if disclosed, reasonably could be expected to cause serious damage to the national security. National security may be damaged by information that pertains to one or more of the following:
> (a) military plans, weapons systems, or operations;
> (b) information obtained from foreign government that does not provide evidence of crimes defined by international law;
> (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
> (d) the identity of confidential sources;
> (e) programs for safeguarding nuclear materials or facilities, or other weapons systems;
> (f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to national defence; or
> (g) the development, production, or use of weapons of mass destruction.

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Second, it should be made abundantly clear that national security is not to be conflated with personal or political embarrassment. If it were, then nothing significant would ever be learned. We should all be able to accept something similar to the provision in American law in this regard: "[i]n no case shall information … fail to be declassified in order to … conceal violations of law, inefficiency, or administrative error; prevent embarrassment to a person, organization, or agency; … [or] prevent or delay the release of information that does not require protection in the interest of the national security." US Executive Order 13526, *Classified National Security Information* (January 5, 2010).

Third, it must be recognized that a large amount of information from the intelligence agencies has already been made public – whether via the ISC reports, parliamentary questions, the Mohamed case, or elsewhere. It is a fundamental principle of open government that material that has already been made public cannot be (re)deemed to be classified.

Fourth, however, if the only material to be heard in public were material that has already been made public, then the inquiry would be a sham. The public would hear nothing new. Thus, it must be made clear that anything that does not fall within the ambit of "national security" must be heard openly.

Sir Peter and his colleagues have a sequence of measures that they might apply with each witness. Some intelligence witnesses may testify in public. For someone who is well known (Jonathan Evans, for example) there is no reason why this should not be the case. Indeed, there have been a number of occasions when Security Service witnesses have previously testified publicly, the *Inquiry into the death of Princess Diana* and the *Airlines Case* to name but two.

If the required showing is made, a witness may testify anonymously, with his identity preserved either by order of the Inquiry, or by allowing him to testify behind a screen (as has been done previously).

Any witness may assert that the answers to particular questions would implicate national security, and request that those answers should be heard in private. However, if this course is taken, the transcript of his private testimony should immediately be redacted or gisted so that as much of the material may be made public as possible, within an agreed timeframe (not to exceed two working days).

The same rules should apply to documentary evidence. A redacted copy of all materials considered by the inquiry should be made available to the public under the same timeframe.

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Finally, simply because something is deemed classified, this does not mean that it cannot be made public. Once it is established that something is genuinely secret, the harm caused by disclosure must be balanced against the public interest in disclosure. This is the well-established public interest immunity approach applied by the Courts. The public interest will often outweigh a claim to secrecy. Indeed, in the case of torture, that will often be the case, as it was in the Binyam Mohamed litigation.

Furthermore, there is no blanket prohibition on disclosure of details of what the Security and Intelligence Services did in the past. A good example of providing extensive public disclosure whilst protecting the most sensitive operational details is the 7/7 report of the ISC, which made public wide-ranging information about the capabilities of the security and intelligence services: www.official-documents.gov.uk/document/cm76/7617/7617.pdf.

The Maher Arar tribunal in Canada is a good example of an inquiry that proceeded substantially in public, dealt with the security services' involvement in torture, and produced a comprehensive report. It is notable that under the rules of the Arar inquiry, while the report was initially issued in redacted form, the redactions were referred to the courts for a final determination of what should, and should not, remain secret. Using this method, many of the redactions were ultimately made public. This provided far more confidence in the legitimacy of the procedure than would censorship by the Cabinet Office.

I am sure you will agree that such rules are entirely rational and sufficient to protect the interests of all sides. I hope that this can be satisfactorily resolved. As I have said before, we at *Reprieve* stand ready to assist in moving this process forwards as rapidly as possible.

I should note that there are many potential problems that face this inquiry, and I shall address others separately.

I remain,

Yours faithfully,

Clive Stafford Smith OBE

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cc. Sir Peter Gibson, Dame Janet Paraskeva, Peter Riddell

Rt. Hon. William Hague MP

Rt. Hon. Nicholas Clegg, MP

Cabinet Office

All counsel for the former Guantánamo prisoners

Etc.

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